XC 113

The Anſwer of Charles *Earl of* Macclesfield, *to the Petition and Appeal of* Alexander Fytton, *from a Decree made in Chancery, by the Right Honorable* Edward *Earl of* Clarendon (*then Lord Chancellor*) *the* 27th *day of* November 14 Car. 2. *And from a Diſmiſſion of the ſaid* Fytton's *Bill of Review, by the Right Honourable the now Lord Keeper.*

THis Reſpondent ſaving the benefit of Exception to the Untruths, and Imperfections of the ſaid Petition, In Obedience to the Order of this Honourable Houſe, for Anſwer, ſaith, That Sir *Edward Fytton*, this Reſpondent's Uncle, having made a Leaſe of his Eſtate for Ninety nine Years to the Lord *Wharton*, and other Truſtees, upon ſeveral Truſts in *June*, 10 *Car.* 1. ſettled the Inheritance to the Uſe of himſelf for Life; and after his Death, to the Uſe of *Jane* his then Wife for her Life: Remainder to the Uſe of the Heirs of his Body; the Remainder to this Reſpondent in Tayle, with power for the ſaid Sir *Edward* to revoke by Deed or Will.

That Sir *Edward Fytton* in *November* 17 *Car.* 1. after the Death of *Jane* his Wife, ſettled the Eſtate to the uſe of himſelf in Tail, with the Remainder to ſuch perſons, and for ſuch Eſtates, as he by Deed or Will, in the preſence of two Witneſſes ſhould appoint. And if no ſuch Appointment, to the uſe of *William Fytton* (a remote Kinſman) for Life, with the Remainder in Tail to the Now Petitioner *Fytton* his Son, with power of Revocation or Alteration, at his pleaſure.

That Sir *Edward Fytton*, and this Reſpondent, being in the Actual Service of his Majeſty King *Charles* the Firſt, in the late Wars: He the ſaid Sir *Edward Fytton* (according to his frequent Declarations) 16 *Auguſt* 19 *Car.* 1. duly made and publiſhed his Will in Writing, in the preſence of Doctor *Smallwood* (late Dean of *Litchfield*) *Francis Hollinſhead* Gent. and other perſons, and thereby Revok't all former Settlements, and declared this Reſpondent (being one of his Co-heirs at Law) to be his Sole Heir, to whom he deviſed all his Eſtate, and ſoon after died without Iſſue, leaving the ſaid Will in Doctor *Smallwood*'s Hands. After whoſe Death, this Reſpondent's Agents entred by vertue of the ſaid Will, and received ſome Profits for ſome time: And this Reſpondent had Adminiſtration duly granted to him of the Eſtate of Sir *Edward Fytton*, with the ſaid Will annexed. But the Wars increaſing, and this Reſpondent continuing in the King's Service, could not attend his particular Affairs, being ſoon afterwards forced out of this Kingdom, for his Loyalty to his Prince; where he continued with his late, and preſent Majeſties in Exile, till their moſt happy Reſtauration.

In which time *Fytton's* having ſet up ſeveral Titles to the ſaid Eſtate, and gotten in ſome Incumbrances of the ſaid Sir *Edward Fytton's*, and

there being ſeveral Suits between them, and the other Co-heirs; the *Fyttons* got Poſſeſſion by the Settlement of 17 *Car.* 1.

That this Reſpondent, ſoon after the King's Reſtauration, in *Eaſter* Term, 1661. Exhibited his Bill in Chancery, againſt the Truſtees in the Leaſe for Ninety nine Years, againſt the Petitioner and his Father, and againſt the Co-heirs at Law, and others, complaining, That he was out of Poſſeſſion, and could not make his Right appear, till his Majeſties bleſſed Reſtauration, and that he then Entred; and the *Fyttons* did Combine to defeat him of the Eſtate, and to incumber it ſo, as he could not enjoy the poſſeſſion of it. Of all which, among many other things, Diſcovery is prayed, and alſo of the Deeds and of the Titles, Claims, and Pretentions of the *Fyttons*, and other Defendants, and Relief upon the whole Matter. Whereunto the Defendants having Anſwered, and the *Fyttons* having in their Anſwer, inſiſted on their Title under the Settlement of *November*, 17 *Car.* 1. did ſet forth a Deed Poll, as a Releaſe of the Power of Revocation in *April*, 18 *Car.* 1. not mentioned in the former Suits with the Co-heirs; but contrived to Avoid this Reſpondents Title under the ſaid Will, and that they knew not whether Sir *Edward Fytton* made ſuch Will. Howbeit, 'twas not material to them whether there was ſuch Will or not: For that the Power of Revocation was releaſed by the ſaid Deed Poll; ſo that the ſaid *Fyttons* made their whole Title and Defence, on the Validity of the ſaid Deed Poll, without ſo much as controverting in their Anſwer, the Reality of the Will, acknowledging by Anſwer, That they were in poſſeſſion of the Eſtate, and had received the Profits thereof, and juſtified the ſame under their ſaid Title. And the Truſtees having anſwered, that they were ready to Aſſign, as the Court ſhould direct.

The 13*th* of *June*, 14 *Ca.* 2. the Cauſe came to be heard before the late Earl of *Clarendon* (then Lord Chancellor) upon reading the Proofs touching the pretended Deed Poll, and alſo touching the Will, and upon the View of the ſaid pretended Deed and Will, his Lordſhip directed a Trial, to try whether the ſaid Deed was Signed, Sealed, and Delivered by Sir *Edward Fytton*, and after the Tryal, either party might reſort to the Chancery.

In *Michaelmas* Term 14 *Car.* 2. a Tryal was had at the Kings Bench Bar, by a Jury of Gentlemen of Reputation, who after a full and clear Evidence (beſides that of *Granger*, one of the Agents in the Forgery) the Tryal laſting about Nine Hours, the Petitioners Deed Poll was found to be Forged. At which Tryal, though the Matter of the Will was not directly in Iſſue, yet the ſame, and Sir *Edward Fyttons* frequent Declarations of Kindneſs, and leaving his Eſtate to this Reſpondent, were fully proved and offered, together with many other Facts, as Circumſtantial Evidence againſt the ſaid pretended Deed Poll.

The 27th of *November*, 14 *Car.* II. the Cauſe coming after the ſaid Verdict to be heard, for the final determination of the *Chancery*: it was decreed that the Truſtees ſhould Aſſign to this Reſpondent, or as this Reſpondent ſhould appoint, and that the Poſſeſſion ſhould be delivered to this Reſpondent, and the Deeds brought into Court, the mean profits computed ſince the entry of the *Fyttons*, and Coſts paid by the *Fyttons*; which Decree this Reſpondent inſiſts was juſt

and

and well grounded. And yet the Court in favour to the Petitioner, declared, That notwithſtanding the ſaid Decree, the *Fyttons* might within twelve months bring an Action at Law for Tryal of their right upon the ſaid Deed. At which the ſaid Leaſe for 99 Years was not to be given in Evidence. And if the *Fyttons* ſhould recover, did reſerve a further conſideration touching the ſaid Leaſe, notwithſtanding the Aſſignment; and the Examiner was to produce the pretended Deed-Poll at the Tryal. But if the *Fyttons* ſhould not recover a Verdict within that time, then the ſame was to be damned and made void.

That thereupon the *Fyttons*, within the Year according to the liberty given them by the ſaid Decree, did bring an Ejectment againſt this Reſpondent, which came to be Tryed the ſecond day of *November*, 1663. before Mr. Juſtice *Charleton* and Mr. *Milward*, then Juſtices of *Cheſter*, by a Jury of eminent Gentlemen of that County; At which Tryal, which laſted about eight hours, the ſaid Will came directly in queſtion, as conſiſtent with the limitations and power in the Deed of 17 *Car.* I. and was fully proved by Dr. *Smallwood* and Mr. *Francis Hollinſhead* and other Witneſſes, all ſince dead. Whereupon the ſaid *Fyttons* ſtood upon the Deed-Poll (which was produced by the Examiner of the *Chancery*, at this Reſpondents charge, according to the Decree) and endeavoured to prove the ſame to be a real Deed; which, if ſo, had deſtroyed this Reſpondents Title under the ſaid Will. But upon a full and clear Evidence, with the approbation of the ſaid Court, it again appeared the ſaid Deed-Poll was forged, and a Verdict was found for this Reſpondent.

After which ſecond Tryal, by Order and Decree of the 28th of *November* 1663. the ſaid Court of *Chancery* confirmed the Decree of 1662. and ordered it to be executed, and that the Deed-Poll ſhould be utterly damned, and made void. Since which time, being now twenty Years and upwards, this Reſpondent hath had the poſſeſſion of the ſaid Eſtate, but never got any of the Profits received by the *Fyttons*, nor any Coſts.

That the Petitioner, with his Accomplices, having publiſhed falſe and libellous Reflections on this Reſpondents Title, and Proceedings in the ſaid Suits; and the ſame being taken notice of, and the matter thereof heard by this Honourable Houſe on the 9th of *July*, 1663. the ſame was declared and adjudged to be a falſe, odious and infamous Libel. And it was adjudged by this Honourable Houſe, after a very ſerious and deliberate conſideration of the whole matter, That this Reſpondent was clear and free from all or any of the matters of the ſaid Libel. And that the Petitioner ſhould undergo the Judgment of the Houſe, whereby he was fined to the King, and this Reſpondent to proceed at Law for Reparations; and that he ſhould be committed till he produced *Granger*; and that he and his Accomplices ſhould find Sureties for their good behaviour during life.

That this Reſpondent proſecuting the ſaid *Fytton* in the *King's-Bench* for the Forgery of the Deed-Poll, at his humble ſupplication, after earneſt ſollicitation, ſurceaſed his proſecution.

That

That the Petitioner attempting all ways and means to invalidate this Reſpondents Title, to expoſe his Witneſſes to the Will, and to leſſen the credit of the ſaid Verdicts and Decrees, cauſed an Information of Perjury to be filed againſt Dr. *Smallwood* and Mr. *Francis Hollinſhead*, two of the Witneſſes that proved the Will, and Aſſigned the Perjury in their proving the ſaid Will, which came to be Tried at the *King*'s-*Bench* Bar, in the 20th Year of the Reign of His late Majeſty: And upon a full Evidence, to the ſatisfaction of the Court, they were found not Guilty: whereby the truth of the Will is again juſtified by another ſolemn Trial and Verdict at the Bar.

That after all theſe Proceedings, and more than twenty Years uninterrupted Poſſeſſion, joyned to theſe Verdicts, Judgments, Decrees and Proceedings, and the Acquieſcence of the Petitioner therein (though at liberty enough during moſt of the ſaid time to travel into remote parts, and publickly to ſollicite and manage his own and other Perſons Cauſes) without Preſenting or Proſecuting any Appeal to the Lords in Parliament, or any Bill of Review in *Chancery* till *April* 1684. he was admitted to his Bill of Review, by the preſent Lord-Keeper, without paying either the Profits or Coſts, a very rare and extraordinary diſpenſation in *Chancery*. And this Reſpondent pleaded the matters aforeſaid in bar thereof; and upon a long debate thereof, his Lordſhip, who heard no leſs than Ten Councel for the Petitioner at that time, declared, That he ſaw no reaſon to reverſe the Decree: therefore diſmiſt the Bill of Review; which diſmiſſion is ſince duly Signed and Inrolled. Wherefore, and in as much as it is now above Forty Years ſince Sir Edward *Fytton* died, and the Witneſſes to his Will are all dead, and the ſaid Decree was made and grounded upon ſo ſolemn Proceedings as aforeſaid, and an Acquieſcence therein for all the ſaid time, and a Bill of Review diſmiſt in *Chancery*, ſince this Reſpondent is adviſed it is without preſident, and that it would be of dangerous Example and Conſequence to draw now, under another or further Examination, any the matters of Fact aforeſaid, ſo ſolemnly and deliberately ſettled, and render the Juſtice of the Kingdom unſtable and unſafe to be relied upon:

And therefore he humbly prays the Judgment of this Honorable Houſe, Whether they will be any further troubled in this Matter, but that the ſaid Petition may be diſmiſt with Coſts, &c.